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8 BEFORE THE ENERGY COMMISSION OF THE STATE OF CALIFORNIA  
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10 In the Matter of AES Huntington Beach  
Generating Station Retool Project  
11 Application for Certification  
12  
13

Docket No. 00-AFC-13

14 **PETITION OF AES HUNTINGTON BEACH, LLC**  
15 **FOR RECONSIDERATION OF SPECIFIC CONDITION**  
16 **OF CERTIFICATION DECISION**

17 AES Huntington Beach, LLC (“AES”) hereby submits this Petition for  
18 Reconsideration of a specific condition of the May 10, 2001 Commission Decision (“CD”) by  
19 the California Energy Commission (“Commission”) to grant a limited certification for Units 3  
20 and 4 at AES’ Huntington Beach, California facility. Specifically, AES requests that this  
Commission reconsider and withdraw Condition EMERGENCY-1.

21 AES believes that this condition was and is based upon errors of law and fact, and  
22 that events subsequent to the Certification have rendered the condition subject to reconsideration.

23 AES requests that the Commission withdraw condition EMERGENCY-1, which requires a  
24 contract with the California Department of Water Resources (“DWR”), because the ability to  
25 comply with such a condition is beyond the reasonable control of AES. AES remains willing  
26 and able to sell the electricity from this project to the DWR in accordance with the substantive  
27 terms and conditions that were outlined in a March 2001 term sheet – before the CD was issued.

28 While substantial progress toward a final agreement has been made, a definitive agreement is not

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1 yet complete. AES remains hopeful that the conflict with the DWR will be resolved in time to  
2 begin operation of Huntington Beach Units 3 and 4 by the target date. However, Section 25530  
3 of the California Public Resources Code imposes a 30-day deadline for filing motions for  
4 reconsideration. AES is therefore forced to file this motion as a precautionary measure, in case a  
5 definitive agreement is not reached.

6 If the Commission modifies or withdraws this condition as AES requests, then  
7 AES can proceed with its plans to supply much-needed electricity to the citizens of California  
8 even in the absence of a final agreement with the DWR.

9 I. **The Commission's Imposition of Condition of Certification EMERGENCY-1 Was**  
10 **Outside Its Authority and Violates the Commerce Clause of the Federal**  
11 **Constitution**

12 EMERGENCY-1 provides that AES must "enter into an electricity sales contract  
13 with DWR to sell the generation from Huntington Beach Units 3 and 4 to address the electricity  
14 supply emergency." CD at 9. For months now, AES has been voluntarily working with the  
15 DWR to enter into a contract for sale of electricity. This voluntary agreement would effectively  
16 render condition EMERGENCY-1 moot. However, as AES communicated to the Commission  
17 several times during the certification process,<sup>1</sup> forcing AES to sell its electricity within the state  
18 is a patent violation of the Commerce Clause of the Federal Constitution (Art. I, § 8, cl. 3),  
19 which prohibits states from placing restrictions on the sale of wholesale electricity in interstate  
20 commerce. Such a condition also intrudes upon the exclusive jurisdiction of the Federal Energy  
21 Regulatory Commission ("FERC") to regulate interstate commerce in wholesale electricity. The  
22 Commission is therefore without authority to impose a condition of certification limiting AES'  
23 right to sell electricity in interstate commerce. Notwithstanding AES' multiple verbal and  
24 written objections to EMERGENCY-1 during the pendency of AES' certification application, the  
25 Commission was unwilling to omit this condition for the certification. While AES continues to

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26 <sup>1</sup> For example, AES specifically detailed its objections to the sales restriction in EMERGENCY-  
27 1 in its April 12, 2001 "Brief in Response to Proposed Conditions Restricting Sale of  
28 Electricity," filed in response to an order of this Commission requesting briefing on the question  
of whether it had authority to impose condition EMERGENCY-1.

1 work with the DWR and intends that the electricity generated from the units would benefit the  
2 citizens of California in the near term energy crisis, AES now respectfully requests that this  
3 Commission reconsider its decision to impose this condition in the CD and withdraw  
4 EMERGENCY-1 as a condition of certification.

5           The Commerce Clause of the United States Constitution gives the federal  
6 government the exclusive power “[t]o regulate Commerce . . . among the several States.” U.S.  
7 Const. art. I, § 8, cl. 3. Under the Commerce Clause, states are not allowed to place restrictions  
8 on the sale of wholesale electricity in interstate commerce. The United States Supreme Court  
9 has consistently held that the Commerce Clause “precludes a state from mandating that its  
10 residents be given a preferred right of access, over out-of-state consumers, to natural resources  
11 located within its borders or to the products derived therefrom,” and has applied this rule in  
12 barring state attempts to regulate interstate commerce in wholesale electricity. New England  
13 Power Co. v. New Hampshire, 455 U.S. 331 (1982); see also Hughes v. Oklahoma, 441 U.S. 322  
14 (1979); Pennsylvania v. West Virginia, 262 U.S. 553 (1923).

15           In New England Power Co. v. New Hampshire (“NEPC”), the Supreme Court  
16 unanimously struck down a state utility commission’s order restricting an in-state power  
17 facility’s export of electrical power to out-of-state consumers. In NEPC, the New Hampshire  
18 Public Utilities Commission (“NHPUC”) ordered NEPC, a New Hampshire-based power plant,  
19 to sell certain electrical output previously exported out of state to customers within New  
20 Hampshire because, as the NHPUC asserted, giving state residents priority of use over the  
21 electricity would address rapidly increasing energy demands and would serve the “public good.”  
22 NEPC, 455 U.S. at 335. The Supreme Court struck down the NHPUC’s order as a direct  
23 violation of the Commerce Clause, pointing out that the order “is precisely the sort of  
24 protectionist regulation that the Commerce Clause declares off-limits to the states.” Id. at 339.  
25 The Court added that the clear effect of the order was to accord an economic advantage to state  
26 residents at the cost of power customers in neighboring states, and that it was beyond dispute that  
27 the order’s restriction on power export imposed “direct and substantial burdens on transactions in  
28 interstate commerce.” Id.

1           As the NEPC Court further recognized, under the Federal Power Act (“FPA”), the  
2 regulation of interstate commerce in wholesale electricity is clearly within the exclusive province  
3 of the FERC, and state attempts to restrict this commerce that are not otherwise exempted are  
4 preempted and void. See id. at 339. In Part II of the FPA (16 U.S.C. §§ 824-824k), Congress  
5 reserved to the FERC the authority to regulate the transmission of electricity and the sale of  
6 wholesale electricity in interstate commerce. See 16 U.S.C. § 824. The Supreme Court has  
7 established that federal regulation of wholesale electricity sales and rates preempts state  
8 regulation in these areas, and that FERC’s jurisdiction over wholesale electricity sales and rates  
9 is exclusive. See Federal Power Comm’n v. Southern Cal. Edison Co., 376 U.S. 205 (1964). By  
10 the terms of the FPA and its supporting case authority, states are thereby prohibited from  
11 regulating sales and rates of wholesale electricity in interstate commerce. See id.; see also Utah  
12 v. FERC, 691 F.2d 444, 446-47 (10<sup>th</sup> Cir. 1982) (holding FERC has “exclusive authority” over  
13 contracts for wholesale power in interstate commerce).

14           The State of California has no power to prohibit, restrict or otherwise burden  
15 interstate commerce in wholesale electricity, and these sales are solely within FERC’s  
16 jurisdiction to regulate. Accordingly, attempts by the state to regulate interstate transmission of  
17 electricity are barred by the Commerce Clause and preempted by the FPA. The Commission  
18 therefore cannot mandate the requested contract with the DWR as a way of giving in-state  
19 residents a preferred right of access to AES-generated electricity in California.

20           The CD attempts to justify EMERGENCY-1 by claiming that the California  
21 energy emergency is a “unique circumstance” on which “[t]here is no case directly on point” (see  
22 CD at 6), and that EMERGENCY-1 is necessary to address the “emergency circumstances”  
23 created by California’s in-state electricity needs. Contrary to the CD’s suggestion, however,  
24 Supreme Court authority directly holds that there is no “emergency” exception to the Commerce  
25 Clause that justifies or authorizes the Commission’s imposition of condition EMERGENCY-1.  
26 State residents simply cannot be accorded a preferred right of access to electricity under the  
27 Commerce Clause, even where the state seeks to create that right as a way to address an in-state  
28 energy shortage. The Supreme Court has held that even pressing in-state energy needs do not

1 justify granting state residents a preferred right of access to electricity generated within the state.  
2 In NEPC, the NHPUC argued that power export restrictions were necessary to address the  
3 rapidly increasing energy needs of in-state consumers, and that power export restrictions were  
4 necessary to serve the “public good.” See NEPC, 455 U.S. at 335-36. The Supreme Court  
5 considered and rejected the notion that local energy demands justify unconstitutional power  
6 export restrictions in violation of the Commerce Clause. The proposed condition here, just like  
7 the order in NEPC, would give state residents an unconstitutional preferred right of access to  
8 electricity generated from Units 3 and 4 at the HBGS for the purported justification of satisfying  
9 in-state energy needs. This kind of mandated in-state preference for power directly contravenes  
10 the Commerce Clause and was unanimously rejected by the Supreme Court.

11 In any case, no evidence appears in the administrative record to support the  
12 proposition that the energy needs of California consumers cannot be served without restrictions  
13 on power export. Indeed, the process of interstate power import and export was a *critical* factor  
14 in keeping power flowing to millions of California homes during the power emergency.  
15 Restrictions on the export of power from California to neighboring states like Nevada and  
16 Washington may have the subsequent effect of encouraging these states to impose reciprocal  
17 power export restrictions, thereby jeopardizing California’s ability to import out-of-state power  
18 when necessary. As discussed above, this would result in the kinds of restrictions on interstate  
19 electricity commerce the FPA and FERC were created to prevent.

20 Finally, the Commission is without legal authority under state law to require AES,  
21 as a condition of certification, to enter into an agreement with DWR to sell electricity. Neither  
22 California statutes nor the Governor’s Executive Orders confer upon the Commission the power  
23 to force power generators, as a condition of facility certification, to contract with the state to give  
24 state residents a preferred right of access to electrical power. Such an act is outside the  
25 Commission’s powers to impose conditions of certification related to mitigation of significant  
26 adverse environmental, health or safety impacts, or to ensure compliance with applicable law,  
27 ordinances, regulations and standards. See Cal. Pub. Res. Code §§ 25523, 25525, 25550; 20  
28 CCR §§ 1741-1744.5, 1748-1755, 2027, 2030.

1 AES has notified the Commission on several occasions throughout the  
2 certification process that, while AES opposes a certification condition mandating that it enter a  
3 contract with DWR to supply electricity within state borders, AES has been voluntarily pursuing  
4 (and continues to voluntarily pursue) an electricity sales agreement with DWR. Although AES  
5 and DWR are continuing to negotiate that contract, condition EMERGENCY-1 appears to be  
6 impeding AES' ability to finalize such a contract with DWR.

7 Accordingly, AES reiterates its request that the Commission withdraw condition  
8 EMERGENCY-1 from the CD.

9 II. **Conclusion**

10 For the foregoing reasons, AES respectfully requests that this Commission  
11 reconsider Certification Condition EMERGENCY-1 and withdraw this unauthorized and  
12 unnecessary condition from AES' certification.

13 McCUTCHEN DOYLE BROWN & ENERSEN, LLP  
14 Attorneys for AES Huntington Beach, LLC

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16 \_\_\_\_\_  
Rick R. Rothman

Application for Certification for the AES  
Huntington Beach Generating Station  
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PROOF OF SERVICE

I am over 18 years of age, not a party to this action and employed in the County of Los Angeles, California at 355 South Grand Avenue, Suite 4400, Los Angeles, California 90071-3106. Today I caused the original and eleven true copies of the document entitled:

**PETITION OF AES HUNTINGTON BEACH, LLC FOR RECONSIDERATION  
OF SPECIFIC CONDITION OF CERTIFICATION DECISION**

with attached PROOF OF SERVICE and SERVICE LIST to be delivered via Federal Express next-day delivery with postage thereon fully prepaid and addressed to:

CALIFORNIA ENERGY COMMISSION  
Attn: Docket Unit  
1516 Ninth Street, MS-4  
Sacramento, CA 95814-5512.

Today I also caused true copies of the same document to be served on the parties named in the attached Energy Commission electronic proof of service list for Docket No. 00-AFC-13, by sending such copy via electronic mail or, where the party did not identify his or her electronic mail address, depositing a true copy of the document in the U.S. mail with first-class postage affixed thereto.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on June 11, 2001.

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**Jennifer M. Hartman**

Application for Certification for the AES  
Huntington Beach Generating Station  
Retool Project – Docket No. 00-AFC-13

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